Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

GERARDO ANTONIO SEGUI

Petitioner

vs.

THE UNITED STATES of AMERICA

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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19 pp

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE "HARMLESS ERROR" DOCTRINE HAS BEEN IMPROPERLY APPLIED WHERE THE GOVERNMENT'S "TESTIMONY LAUNDERING" CONCERNING A THREAT ALLEGEDLY MADE BY THE DEFENDANT HAS VIOLATED THE DEFENDANT'S CONFRONTATION RIGHTS PURSUANT TO THE SIXTH AMENDMENT AND THE GOVERNMENT HAS CONFESSED ERROR.

II

WHETHER THE "HARMLESS ERROR" DOCTRINE HAS BEEN IMPROPERLY APPLIED WHERE THE PROSECUTOR'S CLOSING ARGUMENT HAS DISPARAGED THE INSTITUTIONAL ROLE OF DEFENSE COUNSEL.

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the following is a list of all parties to the proceedings who were not listed in the caption of the case:

All parties to the proceedings are listed in the caption of this case.

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I

This case affords the Court the opportunity to address misapplications of the "harmless error" doctrine and to prevent its conversion by the Eleventh Circuit Court of Appeals into an expediency to bail out the Government even when the Government has confessed error to a violation of the Petitioner's substantial Constitutional rights.

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OPINIONS BELOW

Petitioner seeks review of the unreported opinion of the United States Court of Appeals for the Eleventh Circuit in United States vs. Segui, (See Appendix "A"). That opinion affirmed the Petitioner's conviction and sentence. The mandate of the Eleventh Circuit was issued on June 14, 2001. (Appendix "B").

STATEMENT OF JURISDICTION

This petition is filed within ninety days of June 14, 2001, the date of the issuance of the mandate of the Eleventh Circuit. The Court's jurisdiction is invoked under 28 U.S.C. subsection 1254 (1).

STATEMENT OF THE CASE

A. Course of Proceedings Below

On June 22, 1999, a one count indictment was filed in the Southern District of Florida, charging the Petitioner, Gerardo Segui, with possession with intent to distribute cocaine. Following a jury trial, the Petitioner was found guilty as charged in the indictment. Petitioner was sentenced to 235 months imprisonment to be followed by five years of supervised release.

B. Statement of the Facts

The facts herein are relatively simple. They revolve around the events of June 4, 1999.

Case Agent Scott Ambrose of the Drug Enforcement Administration testified that early in the morning that day he met with two confidential informants to formulate a plan for their purchase of cocaine from the Petitioner. The informants later met the Petitioner at a cafeteria in Miami. The cafeteria was under surveillance.

Agent Ambrose observed the Petitioner arrive at the cafeteria. The informants arrived shortly thereafter and met with the Petitioner outside of the cafeteria for approximately fifteen minutes. Thereafter, the informants followed the Petitioner to this residence.

After a short time inside the residence, the

Petitioner and informants exited. The female informant entered her vehicle and drove off. The Petitioner and male informant entered the Petitioner's pick up truck. The Petitioner was seen carrying a black bag. As the Petitioner drove off his truck was stopped. The black bag contained twelve kilograms of cocaine.

The Petitioner's theory of defense was that he had been set up by the informants. The Petitioner presented evidence and testimony that the informants had the "means, motive and opportunity", to have set him up. The male informant had previously been convicted of a multi-kilogram cocaine deal and therefore had the "means" to have acquired large amounts of cocaine. He had the "motive" to "set-up" the Petitioner to keep him and his wife out of jail. Finally, he had the "opportunity" to set up the Petitioner, having been at the Petitioner's house, unsupervised, on previous occasions.

REASON FOR GRANTING THE WRIT

This case affords the Court the opportunity to address misapplications of the "harmless error" doctrine and to prevent its conversion by the Eleventh Circuit Court of Appeals into an expediency to bail out the Government even when the Government has confessed error to a violation of the Petitioner's substantial Constitutional rights.

The Government, for strategic reasons, chose not to present the testimony of its confidential informants. Thus, the Petitioner's conviction rested primarily on the testimony of DEA Agent Ambrose. Over objection, the Government was allowed to introduce inadmissible hearsay testimony as to the Petitioner threatening the female confidential informant with bodily harm. This testimony clearly violated the Petitioner's confrontation rights pursuant to the Sixth Amendment of the Constitution of the United States. The Government confessed error in the admission of this hearsay testimony.

The opinion of the Eleventh Circuit below specifically recognized that "the potential prejudice from death threats may be great". (App. "A"). Notwithstanding its recognition of the prejudice arising from death threat testimony, the Eleventh Circuit nonetheless found the admission of the hearsay testimony herein to be "harmless error". The Eleventh Circuit's opinion

ignores the vigorous defense presented to the jury that the Petitioner was "set up" by the informants who had the "means, motive and opportunity" to have done so.

The opinion of the Eleventh Circuit severely misapplied the "harmless error" doctrine by looking only at the evidence presented to the jury by the prosecution. It discounted the entire theory of defense as irrelevant, and assumed that the jury's ability to weight both the prosecution's evidence and evidence in support of the theory of defense was not distorted by the admittedly prejudicial testimony as to death threats, which was presented to the jury with no limiting instruction whatsoever.

Furthermore, the opinion of the Eleventh Circuit misapplied the "harmless error" doctrine to the prosecutor's clearly improper closing argument concerning the institutional role of defense counsel. The opinion of the Eleventh Circuit, finding the closing argument of the prosecutor to be improper but "harmless", was a misapplication of the appropriate standard of review, converting the "harmless error" doctrine into an expediency to bail out the Government as the need arises.

As an increasing number of Federal criminal trials result in convictions obtained through either serious prosecutorial misconduct or clear and admitted violations of a criminal defendant's Constitutional rights, so too does the potential for abuse of the "harmless error" doctrine. Certiorari should be granted to strictly redefine the limits of the "harmless error"

doctrine and to prevent its conversion into an expediency to bail out the Government even when the Government has confessed error.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that his Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 99-15010
Non-Argument Calendar

D.C. Docket No. 99-00452 CR KMM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GERARDO ANTONIO SEGUI,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

April 10, 2001

Before EDMONDSON, BLACK and HULL, Circuit Judges

PER CURIAM:

Appellant Gerardo Segui appeals his conviction for possession of cocaine with intent to distribute, 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. He raises three issues on appeal. We find no reversible error and thus we affirm Appellant's conviction and sentence.

Appellant first argues the district court erred in admitting hearsay testimony concerning threats he allegedly made against the Government's informants, and that this error violated his confrontation rights pursuant to the Sixth Amendment to the United States Constitution. We review a district court's evidentiary decisions for an abuse of discretion. *See United States v. Jiminez,* 224 F.3d 12443,1249 (11th Cir.2000). For Constitutional violations, this Court applies the harmless-error standard for Constitutional error and will affirm if it believes beyond a reasonable doubt that the jury would have convicted the Defendant without the offending testimony. *See Delaware v. Van Arsdall*, 106 S.Ct. 1431,1438 (1986); *United States v. Hunerlach*, 197 F.3d 1059,1067 n.9 (11th Cir.1999). Here, the Government concedes that admitting the evidence of threats was error but argues that such error was harmless. We agree. While this Court has recognized that "the potential prejudice from death threats may be great[,]" *United States v. Gonzales*, 703 F.2d 1222,1223 (11th Cir.1983), in this case it appears beyond a reasonable doubt that the jury would have convicted Appellant without the offending testimony. Government informants met with Appellant to discuss the purchase of cocaine, and subsequent to this meeting law enforcement officers observed Appellant exit his residence carrying a bag containing 12 kilograms of cocaine and place the bag in his vehicle. Accordingly, we find no reversible error.

Appellant next argues the trial court erred in denying his motion for mistrial based upon improper statements made

by the prosecutor during closing argument.[1] This Court reviews "allegedly improper comments by the prosecutor on the particular facts of the case and in the context of the entire record". *United States v. Smith*, 918 F.2d 1551,1562 (11th Cir.1990). Reversal on the basis of prosecutorial misconduct requires that the misconduct be "so pronounced and persistent that it permeates the entire atmosphere of the trial." *United States v. Blevens*, 555 F.2d 1236,1240 (5th Cir.1977)[2]; *see also United States v. de la Vega*, 913 F.2d 861,872 n.11 (11th Cir.1990)("The remarks made by the prosecutor, including allegations that defendant was 'tripping over his own lies' and that defense tactics were 'smoke screens', while improper, were not so pronounced and persistent as to permeate the entire atmosphere of the trial"). In this case, the challenged statement made by the prosecutor during closing argument, while improper, was not so pronounced and persistent as to permeate the entire atmosphere of the trial. Accordingly, we conclude the district court did not err in denying Appellant's motion for mistrial.

Lastly, Appellant argues the district court erred in allowing Agent Ambrose to testify during rebuttal to the meaning of coded terms on transcripts of undercover tapes of telephone conversations to which Ambrose was not a party. Again, we review a district court's evidentiary decisions for an abuse of discretion. *See Jiminez*, 224 f.3d at 1249. If an

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1 The prosecutor, in his rebuttal closing argument to the jury, stated, This is a straight forward case. The defense would - it's his job to try to use mirrors and - ." Defense counsel immediately objected to the prosecutor's remarks, and the district court overruled the objection.

2 In *Bonner v. City of Prichard*, 661 F.2d 1206,1209 (11th Cir.1981)(en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

abuse of discretion occurred , it is evaluated for harmless error. *See United States v. Bowe*, 221 F.3d 1183,1192 (11th Cir.2000); *United States v. Hands*, 184 F.3d 1322,1329. The district court generally has broad discretion in admitting or excluding opinion testimony, and that discretion will not be disturbed unless it is manifestly erroneous. *See United States v. Brown*, 872 F.2d 385,392 (11thCir.1989).

According to Appellant, because Agent Ambrose was not a participant in the conversations, his testimony was not rationally based on his own perceptions, and thus could not be admitted under Federal Rule of Evidence 701. Appellant acknowledges that Ambrose could have testified as an expert to the meaning of code words used by Appellant and the informant, but appellant asserts that the Government failed to give pre-trial notice that Ambrose would be appearing as an expert. Accordingly, Appellant argues, Ambrose's testimony should have been excluded by the district court. We disagree. Ambrose's rebuttal testimony about the meaning of coded terms was properly received because defense counsel opened the door to its receipt by introducing the tapes and transcripts into evidence and challenging Ambrose, during cross examination, to point to evidence that conversations about drugs were on the tapes. Finally, assuming *arguendo* there was error, it would be harmless as there is sufficient evidence, apart from the evidence of the taped conversations, to support the verdict and no reasonable likelihood exists that the evidence had a substantial influence on the verdict. *See Hands*, 184 F.3d at 1329 (11th Cir.1999).

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 99-15010

District Court Docket No.
99-00452 CR KMM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GERARDO ANTONIO SEGUI,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion, included herein by reference, is entered as the judgment of this Court.

Entered: April 10, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elain

Issued as Mandate: June 14, 2001
U.S. Court of Appeals, Atlanta, GA